Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1994

ALBERT J. BELL, JR.,
Petitioner
v.
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS and the LOUISIANA STATE POLICE,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED

I. Whether a District Court, after assigning a case to a Magistrate Judge under 28 U.S.C. s 636(c)(1), retains jurisdiction to grant an extension of time to appeal after final judgment is entered?

II. Whether a District Court is divested of jurisdiction after a Notice of Appeal is filed, thereby nullifying the District Court's subsequent order attempting to vacate the extension previously granted?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Fifth Circuit were petitioner, Albert J. Bell, Jr., and respondents Louisiana Department of Public Safety and Corrections, and the Louisiana State Police. The same parties are before this Court. There are no parties to this action within the scope of Supreme Court Rule 29.1.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Authorities vi

Opinions Below 1

Statement of Jurisdiction 2

Statutory Provisions and Rules 2

Statement of the Case 4

Summary of the Argument 6

Reasons for Granting the Writ 7

I. A DISTRICT COURT JUDGE MAY GRANT AN EXTENSION OF TIME TO APPEAL TO A PRO SE PARTY WHO WISHES TO APPEAL A FINAL JUDGMENT OF A MAGISTRATE JUDGE WITHOUT VIOLATING 28 U.S.C. § 636(c) OR FED.R. APP. P. 3.1 7

A. Bell Reasonably Relied Upon the Plain Language of 28 U.S.C. § 636(c) In Requesting an Extension from the U.S. District Judge 8

TABLE OF CONTENTS
(continued)

B. Bell Did Not Violate Fed. R. App. P. 3.1 by Requesting an Extension from the U.S. District Judge Rather Than the Magistrate Judge 8

C. A Pro Se Plaintiff Can Only be Expected to Rely Upon the Plain Language and Clear Meaning of the Federal Rules 10

D. The Fifth Circuit has Approved of District Judges Hearing the Entire Appeal Even Where the Parties Have Agreed to Appeal Directly to the Court of Appeals 11

II. THE DISTRICT JUDGE HAD NO JURISDICTION TO VACATE HIS EARLIER GRANT OF AN EXTENSION OF TIME 14

A. Upon the Filing of a Notice of Appeal, Jurisdiction Transfers From the District Court to the Court of Appeals 14

B. The Absence of Language Regarding "Good Cause" or "Excusable Neglect" is Not Fatal to Bell's Appeal 15

Conclusion 18

TABLE OF CONTENTS
(continued)

Appendix A1

Judgment of the District Court A1

Reasons for Judgment A2

Notice of Appeal, Nov. 19, 1993 ..... A5

Minute Entry, Nov. 24, 1993 ..... A7

Motion to Reconsider Dismissal of Appeal A9

Memorandum in Support of Motion
to Reconsider Dismissal of Appeal A10

Order, December 29, 1993 ..... A15

Minute Entry, Jan. 11, 1994 ..... A16

Notice of Appeal, Jan. 20, 1994 ..... A17

Minute Entry, Mar. 18, 1994 ..... A18

Minute Entry, Mar. 22, 1994 ..... A19

Fifth Circuit Opinion, July 27, 1994 ..... A22

TABLE OF AUTHORITIES

CASES

Dayton Independent School District v.
U.S. Mineral Products Company,
906 F.2d 1059 (5th Cir. 1990) 14

Freeman v. Petsock,
820 F.2d 628 (3d Cir. 1987) 11

Griggs v. Provident Consumer Discount Co.,
459 U.S. 56 (1982) 13

Kelly v. Lee's Old Fashioned Hamburgers, Inc.,
908 F.2d 1218 (5th Cir. 1990) 16,17

Marrese v. American Academy of Orthopedic
Surgeons,
470 U.S. 373 (1985) 14

RCA Corp. v. Local 241, Intern. Federation of Prof.,
700 F.2d 921 (3d Cir. 1983) 15

Rhome v. Sullivan,
963 F.2d 691 (5th Cir. 1992) 11,12

Romero v. Peterson,
930 F.2d 1502 (10th Cir. 1991) 13

TABLE OF AUTHORITIES
(continued)

STATUTES

28 U.S.C. § 636 . . . . . 2,3,6, *passim*

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

42 U.S.C. § 1981 2,4

42 U.S.C. § 1983 2,4

42 U.S.C. § 2000 et seq 2,4

RULES

Fed. R. App. P. 3.1 2,8,9

Fed. R. App. P. 4(a)(5) 3,16,17

Fed. R. Civ. P. 54(b) 16

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LOUISIANA STATE POLICE,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioner Albert J. Bell, Jr., respectfully petitions this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this civil proceeding on July 27, 1994.

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit are reproduced in the Appendix ["App."] at A1 and A22, respectively.

STATEMENT OF JURISDICTION

This case was filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. and 42 U.S.C. §§ 1981 and 1983. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§1331 and 1343 and 42 U.S.C. § 2000e-5. The jurisdiction of the court of appeals was invoked pursuant to 28 U.S.C. § 636(c)(3) and 28 U.S.C. § 1291. Appeal was taken from the Court of Appeal's decision of July 27, 1994. This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 636(c)(3) and 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

FED. R. APP. P. 3.1

Appeals from a Judgment Entered by a Magistrate Judge in a Civil Case

When the parties consent to a trial before a magistrate judge under 28 U.S.C. § 636(c)(1), any appeal from the judgment must be heard by the court of appeals in accordance with 28 U.S.C. § 636(c)(3), unless the parties consent to an appeal on the record to a district judge and thereafter, by petition only, to the court of appeals, in accordance with 28 U.S.C. § 636(c)(4). An appeal under 28 U.S.C. § 636(c)(3) must be taken in identical fashion as an appeal from any other judgment of the district court.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES
1986 ADDITION

Under the governing statute, 28 U.S.C. § 636(c)(3), the judgment of a magistrate becomes a judgment of the district

court and is appealable to the court of appeals "as an appeal from any other judgment of a district court." This provision is designed to make this point explicit for the convenience of practitioners.

FED. R. APP. P. 4(a)(5)

The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

28 U.S.C. § 636(c)(3)

Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of the district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules Of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

STATEMENT OF THE CASE

On June 13, 1991, Albert Bell filed suit against the Louisiana Department of Public Safety and the Louisiana State Police, alleging that the defendants' hiring procedures and practices discriminated against him because of his race, in violation of Title VII and 42 U.S.C. §§ 1981 and 1983. Record, Vol. 1 ["R1"]-289.

On August 10, 1992, Mr. Bell and the defendants executed a Consent to Proceed Before a United States Magistrate. R1-167. On August 11, 1992, an Order of Reference was signed by the United States District Judge, Henry A. Mentz, Jr. R1-168.

On October 12, 13, and 14, 1993, Mr. Bell's Title VII disparate treatment and disparate impact claims were tried before an advisory jury. U.S. Magistrate Judge Alma L. Chasez did not allow Bell's § 1981 and § 1983 claims to be presented to the jury. R2-303. The advisory jury returned a verdict adverse to Mr. Bell on both of his Title VII theories. Supplemental Record, Vol. 2 ["Supp.R2"]-53.

Summarily stating her agreement with the advisory jury's verdict, Magistrate Chasez dismissed with prejudice Mr. Bell's Title VII claims on October 14, 1993, and further stated that since his § 1981 and § 1983 claims had prescribed there had been no need to present these claims to the jury. *Id.* On October 18, 1993, Magistrate Judge Chasez issued Judgment and Reasons for Judgment against Mr. Bell. R2-340. The Judgment and Reasons for Judgment were entered on the docket on October 19, 1993. *See* App. A1, A2-A4.

On November 19, 1993, Mr. Bell filed his Notice of Appeal. R2-318; App. A5. By minute entry dated November 24, 1993, the Magistrate Judge found that Mr. Bell was not entitled to proceed on appeal in forma pauperis and dismissed his Notice of Appeal as untimely. R2-316; App. A7.

On December 17, 1993, Mr. Bell filed a Motion and Memorandum to Reconsider Dismissal of Appeal before the United States District Court Judge. R2-309; App. A9, A10-A14. On December 29, 1993, this motion was granted with a clarification order issued by the District Court allowing Mr. Bell until January 21, 1994, to re-file his Notice of Appeal. R2-310, 308; App. A15, A16. Mr. Bell filed a second Notice of Appeal on January 20, 1994. R2-307; App. A17.

On February 1, 1994, after Bell had filed his second Notice of Appeal, the Defendants filed a Motion to Vacate Prior Orders of the Court. R2-292. On March 18, 1994 Judge Mentz "vacated" his earlier orders of December 29, 1993, and January 12, 1994. Second Supplemental Record ["2d Supp. R"], Docket Entry 102; App. A18. Subsequently, Magistrate Judge Chasez "denied" Bell's Motion to Reconsider Dismissal of Appeal. 2d Supp. R, Docket Entry 103; App. A19.

Bell then appealed the decisions of Judge Mentz and Magistrate Judge Chasez. The United States Court of Appeals for the Fifth Circuit dismissed the case on July 27, 1994, stating that because the motion was submitted to the wrong authority, it never became a timely appeal. The Court further stated that the District Court judge failed to state good cause for vacating the referral to the Magistrate

Judge as required under 28 U.S.C. § 636(c)(6). The Court concluded that without an order under 28 U.S.C. § 636(c)(6), the case remained before the Magistrate Judge. App. A22.

SUMMARY OF THE ARGUMENT

A decision of a Magistrate Judge acting pursuant to 28 U.S.C. § 636 (c) becomes the judgment of the District Court. A party who wishes to appeal the judgment is appealing a final judgment of the District Court, not of a particular judge of the Court. The District Court Judge is, therefore, a proper authority from which to request an extension of time to file the appeal. When the plain language and clear meaning of the applicable Rules and Statutes support a certain course of action, a party who acts accordingly should not lose his right to appeal.

Once a party has filed its Notice of Appeal, jurisdiction over those aspects of the case on appeal shift from the District Court to the Court of Appeals. The filing of a Notice of Appeal is of great jurisdictional significance, as it divests the District Court of jurisdiction. In the instant case, once a Notice of Appeal was timely file, the District Court lacked jurisdiction to vacate a motion granting an extension of time to file the Notice of Appeal.

REASONS FOR GRANTING THE WRIT

I. A DISTRICT COURT JUDGE MAY GRANT AN EXTENSION OF TIME TO APPEAL TO A PRO SE PARTY WHO WISHES TO APPEAL A FINAL JUDGMENT OF A MAGISTRATE JUDGE WITHOUT VIOLATING 28 U.S.C. § 636(c) OR FED. R. APP. P. 3.1

Title 28, section 636 (c), of the United States Code authorizes a District Court to assign a case to a Magistrate Judge to be heard through final judgment. The role of the District Court after assigning a case to a Magistrate Judge, however, is unclear. The Court of Appeals incorrectly ruled that the District Court has no jurisdiction to grant an extension of time to file a Notice of Appeal after the Magistrate Judge entered a final judgment. This ruling, however, is not supported by the language of the applicable statute and rules. This Court should answer this question of federal jurisdiction so as to make clear the proper route to be taken by a party to appeal a decision by a Magistrate Judge.

Albert Bell was a *pro se* plaintiff in the relevant proceedings below. He wished to appeal the adverse judgment entered by the Magistrate Judge. He filed his appeal one day late (31 days after the judgment). Mr. Bell then filed a motion for an extension of time within which to file his appeal with the District Court Judge who originally had been assigned to hear his case. The District Court Judge granted the motion, giving Mr. Bell until January 21, 1994, to file his Notice of Appeal. App. A15, A16 Mr. Bell timely filed that Notice of Appeal on January 20, 1994. App. A17.

A. *Bell Reasonably Relied Upon the Plain Language of 28 U.S.C. § 636(c) In Requesting an Extension from the U.S. District Court Judge*

Mr. Bell did not try to circumvent the jurisdiction of the Magistrate Judge. Bell, relying on the clear language of the statute and Federal Rules, filed his motion for an extension of time to appeal a decision of the District Court with the District Court. The District Court had jurisdiction to grant Mr. Bell an extension of time in which to appeal. According to 28 U.S.C. § 636 (c)(3), the Magistrate Judge directs the entry of a judgment of the District Court in accordance with the Federal Rules of Civil Procedure. Section 636 (c) does not state anything which would indicate that the District Court Judge is not a proper authority from which to request an extension of time to appeal. Relying upon this statute, Bell had no reason to believe that he could not request the extension from the District Court Judge who had assigned his case to the Magistrate Judge. Indeed, as is evidenced by his granting of the extension, the District Court Judge himself believed the motion was properly before the District Court.

B. *Bell Did Not Violate Fed. Rule App. P. 3.1 by Requesting an Extension from the U.S. District Judge Rather Than the Magistrate Judge*

Federal Rule of Appellate Procedure 3.1 and the relevant Note state:

> When the parties consent to a trial before a magistrate judge under 28 U.S.C. § 636(c)(1), any appeal from the judgment must be heard by the court of appeals in accordance with 28 U.S.C. § 636(c)(3), unless the parties consent to an appeal on the record to a district judge and thereafter, by petition only , to the court of appeals, in accordance with 28 U.S.C. § 636(c)(4). **An appeal under 28 U.S.C. § 636(c)(3) must be taken in identical fashion as an appeal from any other judgment of the district court.**

Note of Advisory Committee on Appellate Rules

> 1986 Note:
>
> Under the governing statute, 28 U.S.C. 636(c)(3), **the judgment of a magistrate becomes a judgment of the district court and is appealable to the court of appeals** "as an appeal from any other judgment of a district court." This provision is designed to make this point explicit for the convenience of practitioners.

Fed. R. App. P. 3.1 and Note (emphasis added).

Following the plain language of Rule 3.1, a party wishing to appeal a final decision of a Magistrate Judge would take his appeal in "identical fashion as an appeal from any other judgment of the district court." Fed. R. App. P. 3.1. In requesting an extension of time in which to appeal, an

appellant would comply with the language of Rule 3.1 by requesting the extension from the District Court. The District Court Judge assigned to the case is a logical choice, because Rule 3.1 advises the appellant to take his appeal in identical fashion as an appeal from a Judgment *of the District Court.*

Rule 3.1 does not require that Mr. Bell's only avenue for an extension to be filing his motion with the Magistrate Judge. In fact, the Advisory Committee Note to Rule 3.1 states that the decision of the Magistrate Judge *becomes the decision of the District Court.*

Relying on the plain meaning of this language, a District Court Judge would be a proper authority from which to request an extension of time for appeal. If the Magistrate Judge's decision *becomes* the decision of the District Court, then the District Court Judge in the case necessarily would have jurisdiction to grant the extension of time to appeal. The judge himself believed he had jurisdiction and granted the extension.

C. *A Pro Se Plaintiff Can Only Be Expected to Rely on the Plain Language and Clear Meaning of the Federal Rules*

Bell, as a pro se plaintiff, could only be expected to rely on the clear meaning of the rules. A pro se plaintiff cannot be expected to read into rules that which is not even clear among lawyers, judges, and courts. The judge in this case granted the extension believing he had jurisdiction. No objections were made by Defendants to the District Court's exercise of jurisdiction until well after the Notice of Appeal had been filed.

The Fifth Circuit stated that the District Court Judge could not act without vacating the order assigning the case to the Magistrate Judge. This was not the issue, however. The District Court Judge never intended to vacate the referral; he was only granting an extension for the appeal, after the Magistrate Judge had carried out her duties under the referral. The instant case clearly illustrates a significant unsettled issue of federal jurisdiction. Uncertainty in the federal appeals process cannot be tolerated. This Court should issue a writ of certiorari to settle this issue and to ensure proper functioning in the federal judiciary.

D. *The Fifth Circuit has Approved of District Court Judges Hearing the Entire Appeal Even Where the Parties Have Agreed to Appeal Directly to the Court of Appeals*

The Fifth Circuit has held that a District Court Judge, absent timely objection, can hear an appeal from a decision of a Magistrate Judge under 28 U.S.C. § 636(c), even though the parties have agreed to appeal directly to the Court of Appeals. *Rhome v. Sullivan*, 963 F.2d 691, 692 (5th Cir. 1992) (expressly rejecting the Third Circuit's holding that any order of a District Court in a 28 U.S.C. § 636(c)(3), which was to go directly to the Court of Appeals, must be vacated. *Freeman v. Petsock*, 820 F.2d 628, 630-31 (3d Cir. 1987)). In *Rhome*, the parties executed a written consent in accordance with 28 U.S.C. § 636(c) to have the Magistrate Judge conduct the proceedings and enter judgment. The parties indicated that any appeal would be taken to the Court of Appeals under 28 U.S.C. § 636(c)(3). *Rhome*, 963 F.2d at 691. The Magistrate Judge entered a final judgment and plaintiff filed a Notice of

Appeal with the District Court Judge. *Id.* The District Court transmitted the Notice of Appeal to the Court of Appeals, which returned the Notice undocketed to the District Court. The District Court then "denied" the appeal stating that the parties had agreed to appeal to the Court of Appeals. Plaintiff requested reconsideration. This request was forwarded to the Court of Appeals. *Id.* at 692. The Fifth Circuit held, "absent a timely objection from appellee, the district judge has the authority to entertain the appeal from an order or judgment of the magistrate judge, even though the parties have signed a consent form indicating that any appeal is to be taken to the court of appeals." *Id.* Further, the court stated, "[j]urisdiction vests at the point that no timely objection is made to the district court's exercise of appellate authority." *Id.*

In the instant case there was no appeal before the District Court. The only thing before the District Court was the motion for an extension of time within which to appeal. Nevertheless, the rationale of *Rhome* is still applicable. If the District Court has jurisdiction to hear an appeal (absent timely objection) as in *Rhome*, the District Court also would have jurisdiction to grant the extension so that the party could appeal to the proper court. The District Court in the instant case was exercising even less control than the *Rhome* District Court, which heard the entire appeal.

Defendants' objection in the instant case cannot be considered timely since the Notice of Appeal had already been filed. Bell filed a motion to reconsider the dismissal of appeal before the District Court Judge on December 17, 1993. App. A9-A14 On December 29, 1993, the motion was granted, with a clarification order issued allowing Bell until January 21, 1994, to file his Notice of Appeal. App.

A15, A16. Bell filed his Notice of Appeal on January 20, 1994. App. A17 Defendant did not file the motion to vacate prior orders of the District Court until February 1, 1994. The order granting the extension was not vacated until March 18, *see* App. A18, almost two months after Bell had filed his Notice of Appeal, *see* App. A17, thereby transferring jurisdiction to the Court of Appeals.

Defendant should have objected to the District Court's exercise of jurisdiction soon after the December 17 motion or surely after the December 29 order. Defendants did not object until *after* Bell had filed his second Notice of Appeal. By that time, jurisdiction had vested in the Court of Appeals and the District Court lacked jurisdiction to vacate the extension previously and properly granted. "[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

Alternatively, the District Court's grant of an extension of time validated *nunc pro tunc* the previously filed Notice of Appeal. An untimely filed Notice of Appeal is validated *nunc pro tunc* when the District Court grants an extension of time to file the Notice of Appeal. *Romero v. Peterson*, 930 F.2d 1502, 1505 (10th Cir. 1991). The District Court in the instant case, therefore, lost jurisdiction on December 29, 1993, when the court granted the extension. The District Court was without jurisdiction to consider Defendant's February 1, 1994, Motion to Vacate the order granting the extension.

II. THE DISTRICT JUDGE HAD NO JURISDICTION TO VACATE HIS EARLIER GRANT OF AN EXTENSION OF TIME

A. *Upon the Filing of a Notice of Appeal, Jurisdiction Transfers from the District Court to the Court of Appeals*

On March 18, 1994, the District Court Judge attempted to vacate the motion granting the extension. App. A18. He did not have jurisdiction to do so. Bell had filed a timely Notice of Appeal on January 20, 1994, long before the judge purported to vacate his order granting the extension. App. A17. Jurisdiction was no longer in the District Court. Jurisdiction vested in the Court of Appeals when Bell filed this Notice of Appeal.

A timely Notice of Appeal shifts jurisdiction over those aspects of the case involved in the appeal from the District Court to the Court of Appeals. *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 379 (1985), *citing Griggs*, 459 U.S. at 58. "The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Id.* The Fifth Circuit applied this rule in *Dayton Indep. School Dist. v. U.S. Mineral Prod.*, 906 F.2d 1059 (5th Cir. 1990), stating, "[w]e are bound by our well-established rulings that the district court loses jurisdiction over all matters which are validly on appeal." *Id.* at 1064.

An exception to the firmly established rule that the Notice of Appeal shifts jurisdiction from the District Court to the Court of Appeals may exist, but "unusual circumstances" must be present. In *RCA Corp. v. Local 241, International Federation of Professional and Technical Engineers, AFL-CIO*, 700 F.2d 921 (3d Cir. 1983), the court held that the District Court had jurisdiction to vacate its order which had granted one party an extension of time in which to file a Notice of Appeal. The court cited "unusual circumstances" motivating its decision -- specifically, that the district court's order granting the extension had been based on misrepresentation by defendant's counsel. *Id.* at 924. The defendant maintained it had not received the plaintiff's Notice of Appeal from the underlying order. *Id.* at 922. While recognizing the general rule that a District Court is divested of jurisdiction once a Notice of Appeal is filed, the court held the order could be vacated because the judge relied on misrepresentations by counsel. *Id.* at 924.

In the instant case, however, no such misrepresentations were made. The District Court Judge was not tricked into granting the extension. He was, in fact, the assigning judge and was therefore familiar with the case.

B. *The Absence of Language Regarding "Good Cause" or "Excusable Neglect" is Not Fatal to Bell's Appeal*

The Court of Appeals noted that the District Court Judge, when he granted the extension, did not note "good cause" for vacating the referral as required by 28 U.S.C. § 636 (c)(6). As previously stated, the District Court Judge never indicated he was vacating the referral. He was simply granting an extension of time within which to file the

Notice of Appeal. Regardless of whether the District Judge was acting pursuant to 28 U.S.C. § 636(c)(6) or Fed. R. App. P. 4(a)(5), his failure to note good cause for granting the extension should not operate to defeat Mr. Bell's appeal. The District Court Judge was convinced that Mr. Bell met the required standards for an extension of the type granted. It is implicit in the District Court Judge's Order granting the extension that Mr. Bell satisfied the requirements. The Fifth Circuit Court of Appeals, in *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218 (5th Cir. 1990), faced a similar issue when a District Judge's Order did not explicitly provide that "no just reason for delay" existed for entry of the judgment sought under Fed. R. Civ. P. 54(b). Rule 54(b) requires an "express" determination that there is no just reason for delay in entering judgment. Even though the District Judge did not expressly state that there was no just reason for delay, the Fifth Circuit held that this determination was implicit in the Order. Both 28 U.S.C. § 636(c)(6) and Fed. R. App. P. 4(a)(5) require only "a showing" of good cause (or excusable neglect under Rule 4(a)(5)). Nothing in either the rule or statute requires the District Judge to expressly state the "good cause" or "excusable neglect" that motivated his decision to grant the extension.

In the instant case, the District Judge was convinced that an extension was proper. Bell should not be denied his right to appeal simply because the District Court Judge did not include some particular language in the Order. The Order reflects the "unmistakable intent" of the District Judge to grant an extension. *Kelly*, 908 F.2d at 1219. There should be a "very reasonable assumption that federal district judges know the requirements" of a frequently used federal rule. *Id.* at 1221. Fed. R. App. P. 4(a)(5) is clearly

a frequently used federal rule. The District Judge did not explicitly mention Rule 4(a)(5), but it is clear from the Order that the he was granting an extension of time within which to file a Notice of Appeal. It is inconceivable that a Federal District Judge would be unfamiliar with or would simply disregard the standards which must be met to receive an extension under Rule 4(a)(5). The District Judge was aware of the appropriate standard to apply and he applied it. This is evidenced by his Order granting the extension. The Order itself implicitly shows that the District Judge was satisfied with Mr. Bell's reasons for needing an extension of time within which to appeal.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully Submitted,

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The assistance provided by Christy A. Rodriguez and Joseph E. Lednick, Jr., law clerks in the Appellate Advocacy Program and student-practitioners in the State of Louisiana, is gratefully acknowledged.

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT J. BELL, JR.	CIVIL ACTION
VERSUS	NUMBER: 91-2191
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL	SECTION: I(5)

JUDGMENT

This case came on for trial on October 12, 1993.

Considering the answers of the advisory jury to the interrogatories propounded by the Court and the reasons orally given by the Court,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Louisiana Department of Public Safety and Corrections and Louisiana State Police, and against Plaintiff, Albert J. Bell, Jr., dismissing plaintiff's suit with prejudice and at plaintiff's costs.

Dated at New Orleans, Louisiana, this 18th day of October, 1993.

_____(signature: Alma J. Chasez)_____
UNITED STATES MAGISTRATE JUDGE

[stamped: "DATE OF ENTRY OCT 19 1993"]

MINUTE ENTRY
CHASEZ, M.J.
OCTOBER 14, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT BELL	CIVIL ACTION
VERSUS	NUMBER: 91-2191
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL	SECTION: "I"(5)

On October 12, 13, and 14, 1993, plaintiff's Title VII disparate treatment and disparate impact claims were tried before an advisory jury. At the conclusion of the trial, the jury returned a verdict adverse to the plaintiff on both of his Title VII theories. Finding that verdict to be adequately supported by the evidence adduced at trial, the Court will enter judgment dismissing plaintiff's Title VII claims with prejudice. The Court now takes this opportunity to supplement the record with respect to the disposition of plaintiff's claims under 42 U.S.C. §§1981 and 1983.

[stamped: "DATE OF ENTRY OCT 19 1993"]

In his original and supplemental complaints, plaintiff alleged that the Louisiana Department of Public Safety and Corrections and the Louisiana State Police had refused to hire him on account of his race in violation of Title VII and 42 U.S.C. §§1981 and 1983. As reflected in plaintiff's original complaint and the "Notice of Right to Sue" attached thereto, plaintiff was advised of the defendants' refusal to hire him on May 15, 1990. The record further reveals that the first papers lodged with the Clerk of Court in this matter, plaintiff's application for appointment of an attorney under 42 U.S.C. §2000e-5(f)(1) and his original complaint, were submitted for filing on June 13, 1991, in excess of one year from the date that the plaintiff was refused employment.

Because neither §1981 nor §1983 contain any specific statute of limitations, federal courts must look to the most analogous state statute of limitations had the action been brought in state court. Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938 (1984); Helton v. Clements, 868 F.2d 793, 794 (5th Cir. 1987). In Louisiana, that period is one year. LSA-C.C. Art. 3492; Elzy v. Roberson, 868 F.2d 793, 794 (5th Cir. 1989); Cross v. Lucius, 713 F.2d 153, 156 (5th Cir. 1983). As the instant lawsuit was filed more than one year from the denial of employment at issue, plaintiff's claims under §§1981 and 1983 are time-barred, thereby obviating any need to present said claims to the jury. Because plaintiff has proceeded in forma pauperis in this matter, the Court hereby dismisses his §§1981 and 1983 claims with prejudice under 28 U.S.C. §1915(d). Graves v. Hampton,

1 F.3d 315, 319 (5th Cir. 1993).[1]

_____(signature)_____
MAGISTRATE JUDGE ALMA L. CHASEZ

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[1]/ In addition, the only defendants properly before the Court at the time of trial were the Department of Public Safety and Corrections and the Louisiana State Police. As to those defendants, Eleventh Amendment immunity would pose a bar to any recovery of a money judgment under the civil rights statutes. See Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989). Although the State Police's "Oral Review Board Members" were named as defendants in an amending compliant, they have never been served or identified in this proceeding.

[stamped: "RECEIVED U.S. DISTRICT EASTERN DISTRICT OF LA., Nov 19 10 PM '93 LORETTA G. WHYTE, CLERK"]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ALBERT BELL, JR.,	*	
	*	CIVIL ACTION
Plaintiff	*	
	*	
versus	*	NO. 91-2191
	*	
LOUISIANA DEPARTMENT	*	
OF PUBLIC SAFETY AND	*	
SECTION "I"(5)	*	
CORRECTIONS, et al.	*	
	*	
Defendants	*	
	*	

* *

NOTICE OF APPEAL

Notice is hereby given that Albert Bell, Jr., plaintiff above named hereby appeals to the United States Court of Appeals for the Firth Circuit from the final judgment in this action on the 19th day of October, 1993.

_____(signature)_____
Albert Bell, Jr.
In Proper Person

[stamped: "CERTIFICATE OF SERVICE: I hereby certify

that I have on this 19th day of Nov., 1993 served a copy of the foregoing on all counsel of record via the United States Postal Service, properly addressed, and postage prepaid.

_____(signature: Albert J. Bell, Jr.)_____"]

MINUTE ENTRY
CHASEZ, M.J.
NOVEMBER 24, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT BELL	CIVIL ACTION
VERSUS	NUMBER: 91-2191
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL	SECTION "I" (5)

On October 19, 1993, judgment was entered in the above-captioned proceeding dismissing plaintiff's suit with prejudice and at his costs. On November 19, 1993, some thirty-one days later, plaintiff filed a notice of appeal from the aforementioned judgment. Plaintiff has heretofore been proceeding in forma pauperis in this matter pursuant to 28 U.S.C. § 1915(d).

Rule 4(a)(1) of the Federal Rule of Appellate Procedure requires that a notice of appeal in a civil case such as this one be filed within thirty days of the entry of judgment. That time period is measured by from the day following the day on which judgment was entered and includes Saturdays, Sundays, and legal holidays unless the last day of the prescribed time period is one such day on which business is not conducted. Rule 26(a), Fed. R. App. P. Applying those rules to the matter at hand, the final day for filing a timely notice of appeal was November 18, 1993. Plaintiff's

notice of appeal, filed on November 19, 1993, is therefore untimely. For that reason, and because the evidence adduced at trial amply supports the jury's verdict and the judgment entered herein, the Court hereby finds that plaintiff is not entitled to proceed on appeal in forma pauperis. Rule 24(a), Fed. R. App. P.

_____(signature: Alma L. Chasez)_____
UNITED STATES MAGISTRATE JUDGE

[stamped: "DATE OF ENTRY NOV 26 1993"]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
[stamped: "COPY IN CHAMBERS"]

ALBERT J. BELL, JR.	CIVIL ACTION
VERSUS	NO: 91-2191
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL	SECTION: I (5)

MOTION TO RECONSIDER
DISMISSAL OF APPEAL

MAY IT PLEASE THE COURT

NOW INTO COURT, enters the plaintiff, Albert J. Bell,Jr, pro se, requesting that the HONORABLE COURT reconsider the dismissal of the appeal entered on November 19, 1993. In adherence to Rule 4(a)(5) of the Federal Rule of Appeallate **[sic]** Procedure, plaintiff, pro se, request **[sic]** though "judicial equity," an extension of time which allows the appeal to be timely filed and docketed into the HONORABLE COURT.

RESPECTFULLY SUBMITTED

___(signature)_____
Albert J. Bell,Jr., pro se
4643 Pecan Street
New Orleans,La. 70126
(504) 242-0752
[stamped: "DATE OF ENTRY JAN 5 1994"]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT J. BELL, JR.	CIVIL ACTION
VERSUS	NO: 91-2191
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL	SECTION: I (5)

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER DISMISSAL OF APPEAL

MAY IT PLEASE THE COURT

OnApril 22, 1993, the SUPREME COURT submitted to Congress an order amending Rule 4. The proposed amendment took effect on December 1, 1993. Rule 4(a)(5) Fed. R. App. P. required the district court, upon a showing of excusable neglect or "good cause," may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a).

Plaintiff prays for an extension of time which would allow the appeal to be timely docketed. A one day extension would be without prejudice to defendant party. Plaintiff deligently [sic] sought legal representation to assist with the appeal as of right, that is in accordance with Rule 4 Fed. R. App. P. Plaintiff requested the legal counsel of Tulane University Appeals Court Clinic, to assist with the continuance of this litigation. Counsel at the clinic advised

plaintiff, the clinic was backlogged and suggested that plaintiff should continue pro/se to handle the appeal. Furthermore, counsel stated that another appeal, at that time, would be burdensome on the clinic and disadvantageous to the other client's appeals on the backlog.

District court did not abuse its discretion in permitting late filing of notice of appeal by appointed counsel whose involvement in numerous court-appointed cases caused him to miss the filing deadline, particularly as overcommittment was due to an excess of public service and alturism [sic], rather than mismanaged ambitions or desire for financial gain. Person v. Gatt,C.A. 7 (Ill.) 1991, 933 F.2d 521.

Exception to 30 day filing requirement for notices of appeal, applicable to prisoners who file pro se and deliver their notices of appeal to prison officials within 30 days with instructions to forward it to district court, would be applied to prisoner who was represented at trial if prisoner was no longer represented at time appeal was filed. Vaughan v. Ricketts, CA. 9 (Ariz) 1991, 950 F.2d 1464.

For the record, plaintiff was represented at trial but was no longer represented by counsel at time of appeal. Moreover, plaintiff was deligently [sic] seeking counsel within 30 day time period to appeal.

Extension for filing notice of appeal could be granted to pro se prisoner ... opposition to extensoin was merely naked assertion that there was no good cause. Weekly v. Jones, C.A. 8 (Mo) 1991, 927 F.2d 382.

"Good cause," standard used to decide whether to grant an extension of time to file notice of appeal applies whether motion for extension of time is filed before or after expiration of 30 day period for lodging appeal as of right. Pontarelli v. Stone, C.A. 1 (R.I.) 1991, 930 F.2d 104.

Extension of time for filing notice of appeal from final judgment dismissing lawsuit on basis of statute of limitations was justified on "good cause" grounds ... Doyle v. Shubs, D. Mass 1989, 721 F.Supp. 379.

Moreover, the record of this litigation shows that the defendants were twice granted an extension of time to answer the complaint. Plaintiff had filed for a default judgment on September 17, 1991, due to the defense's failure to answer his complaint filed on June 13, 1991. Defendants filed a Motion for Extension of Time on September 26, 1991, and were granted an extension to October 21, 1991. A second motion for extension of time was filed on October 21, 1991 which again was granted, extending their time to answer until November 11, 1991. Plaintiff's Motion for Default was denied on October 21, 1991. It should also be noted that the defense is not pro se but has been represented by retained legal counsel at all times during this litigation.

Now due to fairness and judicial equity, plaintiff request [sic] that the HONORABLE COURT reconsider the dismissal of the appeal of this case now at bar.

The definition of "equity" in Black's Law Dictionary is clear, and is the meaning that the would should convey. That definition is:

> Justice administered according to fairness as contrasted with strictly formulated rules of common law. A system of jurisprudence collateral to, and in some respects independent of, "law"; the object of which is to render administration of justice more complete, by affording relief where the courts of law are incompetent to give it, or to give it with effect, or by exercising certain branches of jurisdiction independently of them.

Also, plaintiff wishes to enter into the record, that the United States Court of Appeals 5th Circuit, mailed plaintff documentation, dated November 23, 1993, that the appeal was timely docketed in the court's record. (see exhibit) After receiving such, plaintiff deduced that the appeal was timely filed.

CONCLUSION

Plaintiff acted in good faith and has shown a "good cause" to be granted an extension of time to appeal the trial court judgment entered.

Respectfully Submitted:

_____(signature)_____
ALBERT J. BELL, JR. PRO SE
4643 PECAN STREET
NEW ORLEANS, LA 70126
(504) 242-0752

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this 17th

day of December, 1993, mailed a copy of the foregoing pleading to the attorneys of record for the parties in this action by placing same properly addressed in the U.S. Mail with sufficient postage to insure delivery.

_____(signature)_____
ALBERT J. BELL, JR.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALBERT J. BELL,JR.	CIVIL ACTION
VERSUS	NO: 91-2191
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL	SECTION: I (5)

ORDER

CONSIDERING THE FOREGOING MOTION:

IT IS ORDERED that the HONORABLE COURT reconsider the decision to dismiss the plaintiff's appeal and grant the extension requested.

THUS DONE AND SIGNED, this 29 date of DEC 1993.

(signed: Henry A. Mentz)
UNITED STATES ~~MAGISTRATE~~
JUDGE

MINUTE ENTRY
JANUARY 11, 1994
J. MENTZ

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALBERT J. BELL, JR.	CIVIL ACTION
VERSUS	NUMBER: 91-2191
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL	SECTION: "I" (5)

In clarification of the Order of this Court of December 29, 1993, Mr. Bell has ten (10) days within the date of this minute entry, or until January 21, 1994, at 5:00 P.M. to refile his notice of appeal.

[initialed "H.M."]

Clerk to serve all counsel

[stamped: "DATE OF ENTRY JAN 12 1994"]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT J. BELL, JR.	CIVIL ACTION
VERSUS	NO. 91-2191
LOUISIANA DEPARTMENT OF	SECTION "I" (5)

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Albert J. Bell, Jr., pro se, plaintiff above named hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 19th day of October, 1993.

Such notice is filed in adherence to the Order of this Honorable Court of December 29, 1993.

Respectfully Submitted:

_____(signature)_____
ALBERT J. BELL, JR. pro se
4643 Pecan Street
New Orleans, LA 70126
(504) 242-0752

[stamped: "CERTIFICATE OF SERVICE: The undersigned ~~attorney~~ hereby certifies that he has this 20th day of Jan., 1994, mailed a copy of the foregoing pleading to the attorneys of record for all other parties in this action by {illegible} addressed in the U.S. {illegible} to insure {illegible} (signature: Albert J. Bell, Jr)."]

MINUTE ENTRY
MARCH 18, 1994
J. MENTZ

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALBERT J. BELL, JR.	CIVIL ACTION
VERSUS	NUMBER: 91-2191
LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS, ET AL	SECTION: "I" (5)

There being no opposition and the original order being properly before Magistrate Chasez rather than this Court, the motion of defendants Louisiana State Police and Department of Public Safety and Corrections to vacate prior order of this court is granted. Accordingly,

IT IS HEREBY ORDERED that

1. Defendants' motion to vacate prior orders of this Court is **GRANTED**, and

2. The Court's order of December 29, 1993, and the minute entry of January 12, 1994, clarifying that order are **VACATED**.

3. The hearing set for Wednesday, March 9, 1994 is **CANCELLED**.

[initialed: "H.M."]

Clerk to serve all counsel
[stamped: "DATE OF ENTRY MAR 21 1994"].

MINUTE ENTRY
CHASEZ, M.J.
MARCH 22, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT J. BELL	CIVIL ACTION
VERSUS	NUMBER: 91-2191
LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS, ET AL	SECTION: "I" (5)

Presently before the Court, in this case that was handled by the undersigned upon consent of the parties under 28 U.S.C. §636(c), is plaintiff's "motion to reconsider dismissal of appeal" (rec. doc. 94), the District Court Judge having vacated (rec. doc. 102) his orders of December 29, 1993 and January 11, 1994 (rec. docs. 94, 95) on the unopposed motion of the defendants (rec. doc. 97). For the reasons that follow, plaintiff's motion, to the extent that it can be construed as a request for an extension of time to file a notice of appeal under rule 4(a)(5), Fed.R.App.P., is hereby **DENIED**.

This case was tried to an advisory jury on October 12, 13, and 14, 1993. At approximately midday on October 14, 1993, the jury returned a verdict adverse to plaintiff after a brief period of deliberations. Later that afternoon, plaintiff telephonically contacted the undersigned's Office and expressed, inter alia, an intention to appeal the adverse

decision to the Fifth Circuit Court of Appeals and, if necessary, to the U.S. Supreme Court. Judgment dismissing plaintiff's case was formally entered in this matter on October 19, 1993. (Rec. doc. 87). Under rules 4(a)(1) and 26(a) of the Federal Rules of Appellate Procedure, plaintiff had until November 18, 1993, within which to timely file a notice of appeal from the Court's judgment. However, plaintiff waited until November 19, 1993 to file his notice of appeal. (Rec. doc. 92). Because plaintiff's notice was not timely filed and because the evidence adduced at trial amply supported the jury's verdict, the Court subsequently ruled that plaintiff was not entitled to appeal in forma pauperis at government expense. (Rec. doc. 93). On December 17, 1993, some fifty-nine days following the entry of judgment in this matter, plaintiff filed the motion that is currently before the Court. In seeking an extension of time to appeal under Rule 4(a)(5), Fed.R.App.P., plaintiff argues that he diligently tied **[sic]** to obtain substitute counsel in the thirty-day period immediately following entry of judgment, that the defendants were earlier granted two extensions of time within which to answer plaintiff's complaint, and that he received correspondence from the Clerk of the Fifth Circuit Court of Appeals dated November 23, 1993 advising him that his "...appeal was timely docketed..."

Although plaintiff designated his motion as a "motion to reconsider dismissal of appeal," the Court has not "dismissed" his appeal because it possesses no power to do so; only the Fifth Circuit Court of Appeals may dismiss an appeal for untimeliness. See, e.g., Britt v. Whitmire, 956 F.2d 509 (5th Cir. 1992); Barber v. Security Benefit Life Insurance, 936 F.2d 210 (5th Cir. 1991). In cases such as this one, where a party files a motion for extension of time

to appeal after the initial thirty-day period has expired, he must make a showing of excusable neglect to obtain the requested extension. Britt, 956 F.2d at 511. Plaintiff has not done so in this case. The Court notes that plaintiff, although not a licensed attorney, is far from being a totally uneducated layman unversed in legal terminology. Earlier in this case, he filed and served numerous discovery requests and other pleadings, signing them as "Certified Paralegal-ABA." More importantly, however, plaintiff was clearly aware of his appeal rights as he orally expressed an intention to do so on October 14, 1993 within hours of the jury's verdict. Judgement was not formally entered until October 19, 1993. Yet plaintiff waited until November 19, 1993, thirty-seven days after professing his intention and thirty-one days after entry of judgment, to file his notice of appeal. He makes no argument that his efforts to obtain substitute counsel rendered him unable to file a notice of appeal in a timely fashion. The correspondence attached to plaintiff's motion is dated November 23, 1993, outside the initial thirty-day time period, and mentions only the docketing of plaintiff's appeal, not its timeliness. Under these circumstances, the neglect exhibited by plaintiff is not excusable.

_____(initialed "ALC")_____
UNITED STATES MAGISTRATE JUDGE

[stamped: "DATE OF ENTRY MAR 24 1994"]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[stamped: "FILED JUL 27 1994"]

No. 93-3810
Summary Calendar

ALBERT J. BELL,

Plaintiff-Appellant,

versus

LOUISIANA DEPARTMENT OF
PUBLIC SAFETY AND CORRECTIONS,
ET AL., Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana

(91-CV-2191 "L" (5))

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

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*Local rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

A magistrate judge entered a final judgment for the defendants on October 18, 1993, and Bell did not file a notice of appeal until November 19. The notice of appeal is untimely and this court lacks jurisdiction.

Bell contends that because he filed a motion to extend time with the untimely notice, and because the district judge granted that motion, his notice of appeal was made timely. See Cuevas v. Reading & Bates Corp., 770 F.2d 1371, 1377 (5th Cir. 1985), overruled in part on other grounds, In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir. 1987). This argument fails because the motion was submitted to the wrong authority.

In August 1992, Albert Bell consented to proceed before a magistrate judge, agreeing "to have a full-time United States Magistrate Judge conduct any and all further proceedings in the case, including but not limited to . . . final judgment." The district judge then entered an order referring "all proceedings" to a magistrate judge. When the district judge subsequently granted the extension of time, he did not note "good cause" for vacating the referral as required by 28 U.S.C. § 636(c)(6); indeed, he subsequently entered an order vacating the extension because the "original order [was] properly before Magistrate Chasez rather than this Court . . . ." Absent an order under § 636(c)(6), the case remained before the magistrate judge and his **[sic]** ruling denying an extension of time controls.

DISMISSED.